

1 (The document referred to was
2 marked for identification as
3 Kay Exhibit No. 41.)

4 MR. SHAINIS: Next I would like identified as --

5 MR. SCHAUBLE: Just an inquiry. Is this what --

6 MR. KELLER: See, I think what happened is it is
7 not just a matter of the index. The index is also
8 consistent with the tabs except for this part. That is the
9 problem.

10 MR. SCHAUBLE: I do not know. I mean, I am
11 reading as I go along.

12 MR. KELLER: I know. I know.

13 JUDGE CHACHKIN: All right. What is 42?

14 MR. SHAINIS: All right. 42, Your Honor, is a two
15 page document. First is a letter, unsigned, dated April 23,
16 1992, addressed to James Kay presumably from Vince Cordaro.
17 It is on VSC Enterprise stationery.

18 The second is a letter dated also April 23, 1992,
19 this one is signed, to James A. Kay from Vincent Cordaro.

20 MR. KELLER: This has already also been admitted
21 as Kay Exhibit 8.

22 JUDGE CHACHKIN: This is Kay Exhibit 8?

23 MR. KELLER: Yes.

24 JUDGE CHACHKIN: All right. The document will be
25 so marked.

1 (The document referred to was
2 marked for identification as
3 Kay Exhibit No. 42.)

4 MR. KELLER: Excuse me one moment. What was 41?

5 JUDGE CHACHKIN: 41 is the applications of Cordaro
6 with the NABER form.

7 MR. SHAINIS: The NABER coordination.

8 JUDGE CHACHKIN: Yes.

9 MR. KELLER: Could I just make a statement for the
10 record that I think will clarify things?

11 In the table of contents that you are referring
12 to, Mr. Schauble, --

13 MR. SCHAUBLE: Yes.

14 MR. KELLER: -- I believe that what was listed as
15 Exhibit 40 has now been identified as Exhibit 41, what was
16 identified as Exhibit 41 has now been identified as Exhibit
17 42, and what was listed as Exhibit 42 has now been
18 identified as Exhibit 40.

19 I think that with those minor reshufflings, we are
20 back on track with the index.

21 MR. SCHAUBLE: Okay.

22 MR. SHAINIS: Your Honor, I would like to now
23 identify as Kay Exhibit 43, which is a ten page exhibit.
24 These are FCC loading cards, Your Honor.

25 JUDGE CHACHKIN: All right. The document will be

1 so marked.

2 (The document referred to was
3 marked for identification as
4 Kay Exhibit No. 43.)

5 MR. SHAINIS: I would like identified as Kay
6 Exhibit 44, and this is a document on a piece of equipment,
7 I believe, called Easy-Link utilizing LTR trunking systems.

8 JUDGE CHACHKIN: How many pages?

9 MR. SHAINIS: It is seven pages.

10 JUDGE CHACHKIN: The document will be so marked.

11 (The document referred to was
12 marked for identification as
13 Kay Exhibit No. 44.)

14 MR. SHAINIS: I would like identified as Kay
15 Exhibit 45. It is a 28 page document, and it is an
16 instruction model for a Zetron Model 80 Trunk Bridge.

17 JUDGE CHACHKIN: The document is so marked.

18 (The document referred to was
19 marked for identification as
20 Kay Exhibit No. 45.)

21 MR. KELLER: How many pages?

22 MR. SHAINIS: It is 28 pages. I am sure we are
23 all going to look forward to the testimony on that.

24 Next, Your Honor, I would like identified as Kay
25 Exhibit 46. Altogether this is eight pages. It consists of

1 a February 12, 1993, letter on Meyer, Faller, Weisman and
2 Rosenberg stationery addressed to Terry Fishel, signed by
3 Allan Tilles, and then there is an attachment to that
4 letter. There is also then a two page letter from the FCC
5 addressed to Mr. Tilles signed by Terry Fishel.

6 JUDGE CHACHKIN: That document will be so marked.

7 (The document referred to was
8 marked for identification as
9 Kay Exhibit No. 46.)

10 MR. SHAINIS: Next, Your Honor, I would like
11 identified as Kay Exhibit 47. This is a 118 page exhibit
12 dealing with various awards that Mr. Kay has been presented
13 and also documentation for loans of radios for various
14 charitable purposes.

15 JUDGE CHACHKIN: The document is so marked.

16 (The document referred to was
17 marked for identification as
18 Kay Exhibit No. 47.)

19 MR. SHAINIS: I would next like marked for
20 identification Kay Exhibit 48. This is 21 pages, and it is
21 an inventory of used radios.

22 JUDGE CHACHKIN: The document is so marked.

23 (The document referred to was
24 marked for identification as
25 Kay Exhibit No. 48.)

1 MR. SHAINIS: Next I would like to have identified
2 as Kay Exhibit 49 a letter dated May 13, 1994, on Federal
3 Communications Commission letterhead. It is a letter
4 addressed to James Kay signed by W. Riley Hollingsworth.

5 JUDGE CHACHKIN: The document is so marked.

6 (The document referred to was
7 marked for identification as
8 Kay Exhibit No. 49.)

9 MR. SHAINIS: Next I would like identified as Kay
10 Exhibit 50. It is an action of James Kay versus various
11 defendants for slander, and the document is 14 pages long.

12 JUDGE CHACHKIN: The document is so marked.

13 (The document referred to was
14 marked for identification as
15 Kay Exhibit No. 50.)

16 MR. SHAINIS: Next I would like identified as Kay
17 Exhibit 51. It is a one page document, an affidavit dated
18 December 12, 1994, signed by Gail Thompson.

19 JUDGE CHACHKIN: The document is so marked.

20 (The document referred to was
21 marked for identification as
22 Kay Exhibit No. 51.)

23 MR. SHAINIS: Then my personal favorite is Kay
24 Exhibit 52. I would like that marked for identification.
25 It consists of 4,000 -- let me make sure I am right on that,

1 Your Honor.

2 JUDGE CHACHKIN: I thought it was 749.

3 MR. SHAINIS: Wait a minute. You are right. It
4 is 749. There are other numbers on there. It is 749 pages,
5 but they are great pages.

6 These are invoices, rental agreements concerning
7 radios.

8 JUDGE CHACHKIN: All right. The document is so
9 marked.

10 (The document referred to was
11 marked for identification as
12 Kay Exhibit No. 52.)

13 MR. SHAINIS: Just a moment, Your Honor.

14 MR. KELLER: Madam Reporter, what is the last
15 exhibit I gave you?

16 THE REPORTER: Exhibit 47.

17 MR. KELLER: 47?

18 MR. SHAINIS: Can we just take a break so the
19 reporter can catch up?

20 MR. KELLER: Your Honor, can we go off the record?

21 JUDGE CHACHKIN: All right. We will go off the
22 record.

23 (Whereupon, a short recess was taken.)

24 MR. SHAINIS: Your Honor, I guess the only person
25 to blame on this is Judge Sippel, but previously exchanged

1 as Exhibit 1, I would like that to be now identified as Kay
2 Exhibit 53.

3 JUDGE CHACHKIN: All right.

4 MR. SHAINIS: This is a two page letter dated
5 November 1, 1994, to Riley Hollingsworth signed by Dennis C.
6 Brown.

7 JUDGE CHACHKIN: The document is so marked.

8 MR. SHAINIS: Thank you.

9 (The document referred to was
10 marked for identification as
11 Kay Exhibit No. 53.)

12 MR. SHAINIS: What has previously been exchanged
13 as Kay Exhibit 2, I would like that now to be identified as
14 Kay Exhibit 54.

15 This is a one page document dated November 18,
16 1991, and it is addressed to James Kay, signed by Riley
17 Hollingsworth.

18 JUDGE CHACHKIN: Is that 1991?

19 MR. SHAINIS: Wait a minute. I am sorry. 1994.

20 JUDGE CHACHKIN: All right. That document is so
21 marked. That is 54.

22 (The document referred to was
23 marked for identification as
24 Kay Exhibit No. 54.)

25 MR. SHAINIS: What has previously been exchanged

1 as Kay Exhibit 3, I would like to have identified as Kay
2 Exhibit 55. Am I right on that?

3 JUDGE CHACHKIN: Yes.

4 MR. SHAINIS: Okay. Thank you.

5 This is a two page document. It is addressed to
6 the Federal Communications Commission, Attn: W. Riley
7 Hollingsworth. It is dated February with a blank for the
8 date, 1994, and it has a signature blank for Dennis C.
9 Brown.

10 JUDGE CHACHKIN: The document is so marked.

11 MR. SHAINIS: Thank you.

12 (The document referred to was
13 marked for identification as
14 Kay Exhibit No. 55.)

15 MR. SHAINIS: I would like to have identified as
16 Kay Exhibit 56, previously exchanged as Kay Exhibit 4. It
17 is a letter dated March 1, 1994, from the Federal
18 Communications Commission addressed to Dennis Brown, signed
19 by Riley Hollingsworth.

20 JUDGE CHACHKIN: The document is so marked.

21 (The document referred to was
22 marked for identification as
23 Kay Exhibit No. 56.)

24 MR. SHAINIS: What has previously been exchanged
25 as Kay Exhibit 5 I would now like to have marked for

1 identification as Kay Exhibit 57, and that is a one page
2 document. It is a letter dated July 27, 1992, addressed to
3 a Mr. Charles R. Wells, signed by Lewis H. Goldman.

4 JUDGE CHACHKIN: The document is so marked.

5 MR. SHAINIS: Thank you.

6 (The document referred to was
7 marked for identification as
8 Kay Exhibit No. 57.)

9 MR. SHAINIS: I would like what has previously
10 been exchanged as Kay Exhibit 8, I would like to now have it
11 marked as Kay Exhibit 58. It is --

12 MR. KNOWLES-KELLETT: Previously exchanged as 6.

13 MR. SHAINIS: I am sorry. What did I say?

14 MR. KNOWLES-KELLETT: 8.

15 MR. SHAINIS: I am sorry. I stand corrected.
16 What now will be Kay Exhibit 58.

17 It is what I think is a six page document dealing
18 with contacts by Harold and Gerard Pick with the FCC and
19 travel information.

20 JUDGE CHACHKIN: The document is so marked.

21 MR. SHAINIS: Thank you.

22 (The document referred to was
23 marked for identification as
24 Kay Exhibit No. 58.)

25 MR. SHAINIS: What has previously been exchanged

1 as Kay Exhibit 7 I would like now to have identified as Kay
2 Exhibit 59.

3 This is a two page document, and it is a letter
4 addressed to Terry Fishel dated December 9, 1991, on
5 stationery of William Drareg & Associates.

6 JUDGE CHACHKIN: D-R-A-R-E-G.

7 MR. SHAINIS: Yes.

8 JUDGE CHACHKIN: The document is so marked.

9 MR. SHAINIS: Thank you.

10 (The document referred to was
11 marked for identification as
12 Kay Exhibit No. 59.)

13 MR. SHAINIS: I would like to have identified as
14 Kay Exhibit 60 what has previously been identified as Kay
15 Exhibit 8 or has previously been exchanged as Kay Exhibit 8.

16 It is a three page document, and it is an FOIA
17 request control log from the Federal Communications
18 Commission, I assume.

19 Excuse me just for a minute, Your Honor.

20 MR. KELLER: It is FOIA control logs.

21 MR. SHAINIS: Right. I would like it to be
22 identified, Your Honor. It is from the FCC.

23 JUDGE CHACHKIN: The document is so marked.

24 //

25 //

1 (The document referred to was
2 marked for identification as
3 Kay Exhibit No. 60.)

4 MR. SHAINIS: What has previously been exchanged
5 as Kay Exhibit 9, I would like to have identified as Kay
6 Exhibit 61.

7 This is a three page document, and it is
8 correspondence from the Forest Service. It is
9 correspondence back and forth between Mr. Harold Pick and
10 the Forest Service.

11 JUDGE CHACHKIN: The document is so marked.

12 (The document referred to was
13 marked for identification as
14 Kay Exhibit No. 61.)

15 MR. SHAINIS: What has previously been exchanged
16 as Kay Exhibit 10, I would like now to have identified as
17 Kay Exhibit 62.

18 This is a six page document. It is a series of
19 transmittal letters all dated January 31, 1994, signed by
20 Anne Marie, and please excuse me, Ms. Wypijewski,
21 Wypijewski.

22 MR. KNOWLES-KELLETT: I think you had just better
23 spell it for the record.

24 MR. SHAINIS: All right. W-Y-P-I-J-E-W-S-K-I. No
25 disrespect is meant to the woman for my mispronouncing her

1 name.

2 JUDGE CHACHKIN: Go ahead.

3 MR. SHAINIS: Anyway, these are transmittal
4 letters signed by her to do you want me to name each of the
5 people who received them?

6 JUDGE CHACHKIN: There is no need to.

7 MR. SHAINIS: All right. I would like to have
8 that identified.

9 JUDGE CHACHKIN: All right. The six page document
10 is marked for identification as Kay Exhibit 62.

11 (The document referred to was
12 marked for identification as
13 Kay Exhibit No. 62.)

14 MR. SHAINIS: All right. We have now identified
15 all of Kay's exhibits.

16 JUDGE CHACHKIN: All right.

17 MR. SCHAUBLE: Your Honor?

18 JUDGE CHACHKIN: Yes?

19 MR. SCHAUBLE: We did not anticipate that we were
20 going to be dealing with this this afternoon.

21 Could we take our lunch recess at this point and
22 perhaps reconvene at 1:30 p.m.? There are a couple things I
23 would like to go back to my office and get in preparation.

24 JUDGE CHACHKIN: All right. That is reasonable.
25 We will be in recess until 1:30 p.m.

1 MR. SHAINIS: Your Honor, if I might?

2 JUDGE CHACHKIN: Yes.

3 MR. SHAINIS: I have no opposition to that. In
4 fairness to the Bureau, who have been very cooperative on
5 this point, and it is appreciated, with your indulgence, if
6 they want more time, such as until 2:00 p.m., that is okay.
7 I mean, it is up to you.

8 MR. SCHAUBLE: I do not think 1:30 p.m. is a
9 problem.

10 JUDGE CHACHKIN: All right.

11 MR. SCHAUBLE: It might be a few minutes after,
12 but I think --

13 JUDGE CHACHKIN: Okay. We will be in recess until
14 1:30 p.m.

15 MR. SHAINIS: Thank you very much.

16 (Whereupon, at 12:10 p.m. the hearing was
17 recessed, to reconvene at 1:30 p.m. this same day, Thursday,
18 January 14, 1999.)

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A F T E R N O O N S E S S I O N

1:30 p.m.

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JUDGE CHACHKIN: Are we ready to proceed?

4

MR. SCHAUBLE: Yes, Your Honor.

5

6

JUDGE CHACHKIN: All right. Mr. Shainis, let's
offer the exhibits and see what happens.

7

8

MR. SHAINIS: Yes. Your Honor, I offer Exhibits
11 through the last number was 62 for admission.

9

10

JUDGE CHACHKIN: All right. Let's take up first
Exhibit 11. Any objection?

11

MR. SCHAUBLE: No objection, Your Honor.

12

JUDGE CHACHKIN: Bureau Exhibit 11 is received.

13

MR. SHAINIS: Not Bureau. Kay Exhibit 11.

14

15

JUDGE CHACHKIN: I mean Kay Exhibit 11 is
received. That is right.

16

17

18

19

20

(The document referred to,
having been previously marked
for identification as Kay
Exhibit No. 11, was received
in evidence.)

21

JUDGE CHACHKIN: What about Kay Exhibit 12?

22

MR. SCHAUBLE: No objection, Your Honor.

23

JUDGE CHACHKIN: Kay Exhibit 12 is received.

24

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25

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1 (The document referred to,
2 having been previously marked
3 for identification as Kay
4 Exhibit No. 12, was received
5 in evidence.)

6 JUDGE CHACHKIN: What about 13?

7 MR. SCHAUBLE: No objection, Your Honor.

8 JUDGE CHACHKIN: Kay Exhibit 13 is received.

9 (The document referred to,
10 having been previously marked
11 for identification as Kay
12 Exhibit No. 13, was received
13 in evidence.)

14 JUDGE CHACHKIN: 14?

15 MR. SCHAUBLE: Your Honor, I do have an objection
16 to this one. I need to give a little background here
17 because I think we are going to be going over this with
18 several documents.

19 MR. KELLER: Which number?

20 MR. SCHAUBLE: 14. This appears to be a Forest
21 Service permit.

22 As Your Honor may know, this is one of the set of
23 documents required to be produced in the 308(b) letter. It
24 was not produced pursuant to the 308(b) letter, but after
25 designation there was a request for production of documents

1 by the Bureau requesting production of Forest Service
2 records, which Mr. Kay opposed.

3 Judge Sippel, on May 1, 1995, in Order FCC
4 95-M-117, Ordered that, "Kay must produce all documents
5 requested that relate to U.S. Forest Service permits
6 relating to the existence and use of an antenna site." The
7 documents that were produced pursuant to that were exchanged
8 as a Bureau exhibit. I believe the numbering is 289.

9 Based on my review, and I could be wrong here,
10 this document was not produced in discovery and was not
11 produced at any time prior to Mr. Kay's exchange of
12 exhibits. Under these circumstances, Your Honor, this was
13 produced far too late in the ball game, and Mr. Kay should
14 not be entitled to rely on this document.

15 JUDGE CHACHKIN: You do not question the relevancy
16 of this document?

17 MR. SCHAUBLE: No, Your Honor, I do not question
18 the relevancy of this document. We believe Forest Service
19 permits are indeed relevant.

20 JUDGE CHACHKIN: Is there an issue dealing with
21 that?

22 MR. KNOWLES-KELLETT: Basically they go to
23 construction, Your Honor.

24 JUDGE CHACHKIN: Pardon me?

25 MR. KNOWLES-KELLETT: They are an indication of

1 construction with respect to the construction and placement
2 and operation of stations.

3 JUDGE CHACHKIN: So you would prefer that the
4 record not contain that information relevant to the issue
5 because it has been produced late? Is that your position?

6 MR. KNOWLES-KELLETT: Our position, Your Honor, is
7 that the appropriate sanction for failure to comply with a
8 valid discovery Order is that if you do not produce it when
9 told to, you do not get to enter it into evidence and rely
10 on it later.

11 JUDGE CHACHKIN: Mr. Keller?

12 MR. KELLER: Your Honor, first of all, I
13 apologize. I do not have this handy. As you know, the file
14 in this case is multiple volumes long. Can you recite to me
15 what the specific request was?

16 I also confess that I am without the assistance of
17 Mr. Kay here. I think I know part of the answer to this,
18 but without Mr. Kay to consult with --

19 MR. SCHAUBLE: Your Honor, I have it handy. I
20 could read the specific document request.

21 MR. KELLER: Read the specific request, please.

22 MR. SCHAUBLE: This is Document Request 3 of the
23 Bureau's February 17, 1995, request for production of
24 documents.

25 "3) All documents including, but not limited to,

1 United States Forest Service permits, including amended and
2 modified permits and self-certification forms relating to
3 the existence and use of an antenna site for each of the
4 following stations," and then there are two separately
5 lettered paragraphs here.

6 Subparagraph A is, "Stations identified by call
7 sign in Appendix A of the Order to show cause, hearing
8 designation Order and notice of opportunity for hearing for
9 forfeiture, FCC 94-315, released December 13, 1994," and
10 then there is Subparagraph B, "All other stations owned,
11 operated or under the control of Kay since January 1, 1991."

12 I can provide you with a copy.

13 JUDGE CHACHKIN: What was the response by Kay to
14 that?

15 MR. KELLER: Again, I do not have that in front of
16 me. The Bureau has represented that they have included in
17 what Bureau exhibit number?

18 MR. SCHAUBLE: 289, I believe.

19 MR. KELLER: Bureau Exhibit 289. I have no way at
20 this moment of verifying whether Bureau Exhibit 289 contains
21 all the documents that were produced in response, but
22 accepting the Bureau's representation, the Bureau's further
23 representation is that this document was not among those,
24 the only explanation I can offer right now, if that is the
25 case, and I am guessing, as I say, because I do not have the

1 client here, but I suspect that this is probably a
2 superseded authorization.

3 In other words, what was probably responded
4 pursuant to this request were the currently effective Forest
5 Service permits. The reason this is being offered is we had
6 asked all along in the pre-trial stages of this case. There
7 is accusation that certain stations had not been
8 constructed. Which stations are you saying were not
9 constructed?

10 It was not until the trial brief or something
11 filed shortly before the trial brief, which was filed, you
12 know, within a month or so prior to the most recently
13 scheduled hearing date before this one, that we were
14 actually provided with a list of call signs. At that time
15 was the first opportunity. We then had to go back and see
16 if there was any documentation as to those specific call
17 signs.

18 I suspect what may be the explanation is that this
19 particular document we are looking at was not effective. It
20 is certainly not effective now and was not effective at that
21 time, but still has relevance by way of explaining certain
22 things. To say more, I really need to consult with my
23 client.

24 It would seem to me, Your Honor, that you can
25 allow the document into evidence. As far as the point the

1 Bureau is making, if they want to make the point that Kay
2 somehow had this and withheld it in response to either a
3 308(b) or a specific discovery request, that is certainly
4 something they can argue and attribute to it whatever weight
5 is appropriate, but I do not think it warrants having an
6 incomplete record at this point.

7 Beyond that, I guess I am really at a loss because
8 I need to consult with my client. There is a whole series
9 of documents like this, and some of them I know, and I
10 cannot tell you which ones right now, have to do with that
11 there was a permit issued and was a screw up in the Forest
12 Service. It was issued. It was not properly reflecting
13 another site. It was put through a series of correspondence
14 and amendments to clean it up. Whether this is one of
15 those, I do not know.

16 MR. KNOWLES-KELLETT: Your Honor, I think it might
17 be appropriate to withhold ruling. If you are inclined to,
18 you might withhold ruling until we found out. If it was not
19 responsive, we withdraw our objection.

20 JUDGE CHACHKIN: What was the response?

21 MR. KNOWLES-KELLETT: The response was Exhibit
22 289. They gave us --

23 JUDGE CHACHKIN: I understand, but something must
24 have been said, was there not, to your specific document
25 request?

1 MR. KNOWLES-KELLETT: Look in Box No. 4, and in
2 Box No. 4 are the Bates numbers that are on 289. That is
3 what we got. He had made an objection. The Judge said
4 that --

5 JUDGE CHACHKIN: I want to know in what way were
6 you prejudiced by not having this material in your
7 preparation for hearing? That is my question.

8 MR. KNOWLES-KELLETT: We did an elaborate analysis
9 of what Kay did and did not have, Forest Service permits, to
10 figure out what we were going to investigate and what we
11 were going to allege was not constructed. If we just
12 withhold that --

13 JUDGE CHACHKIN: Well, the point of the matter is
14 you put in evidence the permits which you were given by Kay,
15 did you not?

16 MR. KNOWLES-KELLETT: We did.

17 JUDGE CHACHKIN: So in what way are you prejudiced
18 by having it now rather than earlier?

19 MR. KNOWLES-KELLETT: The only prejudice --

20 JUDGE CHACHKIN: It did not in any way stifle your
21 investigation. You did not conduct a separate investigation
22 of the Forest Service, I presume. You did not put in any
23 Forest Service witness, so in what way are you harmed by
24 getting it now?

25 MR. KNOWLES-KELLETT: I think, Your Honor, that

1 the appropriate sanction for not --

2 JUDGE CHACHKIN: Answer my question. In what way
3 are you harmed by getting it now?

4 MR. KNOWLES-KELLETT: We were asked to chase down
5 dead end roads and then given the evidence that we asked for
6 long ago in the 308(b) letter on the exchange date.

7 JUDGE CHACHKIN: This information, I assume, was
8 available from the Forest Service that you could have
9 obtained, was it not?

10 MR. KNOWLES-KELLETT: I cannot tell you that, sir.
11 We asked for it from Kay.

12 JUDGE CHACHKIN: I understand that.

13 MR. KNOWLES-KELLETT: If we were given all that
14 was there, why would we go to the Forest Service?

15 JUDGE CHACHKIN: Well, presumably if you wanted
16 the information and if it is publicly available --

17 MR. KNOWLES-KELLETT: Your Honor?

18 JUDGE CHACHKIN: -- or at least available to you,
19 then there is no reason for Kay to provide it when you could
20 obtain it from other sources.

21 MR. KELLER: Your Honor?

22 MR. KNOWLES-KELLETT: That is exactly what Mr.
23 Sippel said was not going to happen.

24 JUDGE CHACHKIN: Well, that is his position. That
25 is not my position.

1 MR. KNOWLES-KELLETT: Your Honor?

2 JUDGE CHACHKIN: My point is if you have not been
3 harmed by it, prejudiced in any way in your preparation of
4 the case, and leaving it out would make the record
5 incomplete, then I think as far as balance is concerned, I
6 think it is in favor of putting it in evidence.

7 MR. KNOWLES-KELLETT: Your Honor, I --

8 JUDGE CHACHKIN: If you need more time, if you
9 want additional time to somehow use this for examination, I
10 will afford it to you.

11 If your only objection is that you were not given
12 it, even though it in no way prejudiced you that you get it
13 now, then I am going to receive it.

14 MR. KNOWLES-KELLETT: I disagree with the
15 statement that it in no way prejudices us. Additional time
16 is not going to help us. It was a great strain on our
17 resources to chase down dead end avenues where he neglected
18 to give us documents.

19 JUDGE CHACHKIN: I am talking about these
20 documents, the Forest Service.

21 MR. KNOWLES-KELLETT: He neglected to give these
22 documents.

23 JUDGE CHACHKIN: What investigation did you
24 conduct with regard to the Forest Service permits?

25 MR. KNOWLES-KELLETT: The 308(b) requirements. We

1 sent him a 308(b) letter asking for all of them.

2 JUDGE CHACHKIN: I am not talking about that.

3 MR. KELLER: This was not requested in the 308(b).

4 JUDGE CHACHKIN: We are not talking about the
5 308(b).

6 MR. KNOWLES-KELLETT: Yes, it was.

7 MR. KELLER: No. The 308(b), if I recall, and I
8 would have to pull it out and look, asked which sites on
9 which he had Forest Service permits. I do not think it
10 asked for copies of them.

11 Furthermore, again I am saying I am not conceding
12 for purposes of the record right now that this is now or was
13 even then a current Forest Service permit.

14 MR. KNOWLES-KELLETT: Can I read, Your Honor? In
15 the 308(b) letter it says, "Provide a copy of the U.S.
16 Forest Service permit for those facilities constructed and
17 made operational on Forest Service lands," and continues
18 forward.

19 That is WTB Exhibit No. 1, so counsel's
20 representation that it was not included there is erroneous.
21 The statute allows us --

22 MR. KELLER: State that again. Re-read it again.

23 MR. KNOWLES-KELLETT: Paragraph 3 at the bottom of
24 the page, "Provide a copy of the U.S. Forest Service permit
25 for those facilities constructed and made operational on

1 Forest Service lands in order to list all call signs in 1)."
2 1) referred to, "All call signs alphabetically owned or
3 operated by Kay."

4 MR. KELLER: Okay. Now, hold on. First of all,
5 that is sort of a moot point in the sense that I think the
6 record is clear that nothing was provided in response to the
7 308(b) itself.

8 MR. KNOWLES-KELLETT: Okay.

9 MR. KELLER: That has never been at issue.

10 MR. KNOWLES-KELLETT: We are not --

11 MR. KELLER: Now, what was the exhibit number that
12 was in response to the document request?

13 MR. KNOWLES-KELLETT: 289.

14 MR. SCHAUBLE: Your Honor, I reviewed Exhibit 289
15 and did not see that. Obviously if it is in here, that
16 would --

17 MR. KELLER: Well, I am accepting --

18 JUDGE CHACHKIN: I understand that, but --

19 MR. KELLER: I am accepting for your purposes of
20 this argument right now and accepting your representation on
21 that point.

22 Let me also say this. First of all, regardless of
23 this dispute of whether it should or should not have been
24 presented, I think it is relevant and admissible and
25 relevant for purposes of the construction issue.

1 The Bureau's point may or may not have some
2 relevance under the Section 308(b) issue, and they are
3 certainly free to argue that. Having the document in
4 evidence, as opposed to excluded from evidence, does not
5 prevent them from doing so.

6 I also want the record to reflect, however, that
7 my characterization, and we have heard the Bureau's
8 characterization of the investigation they tried to do and
9 the dead end roads. I want to tell you how it looks from
10 Mr. Kay's point of view.

11 From Mr. Kay's point of view, and I am not going
12 back now to the 308(b). I am talking about from designation
13 forward in this proceeding since the specific dispute is
14 whether the discovery response was complete.

15 Mr. Kay was being accused in one of these issues
16 as to not having timely constructed stations. There has
17 been testimony already in the record that there is some 350
18 repeaters operated by Mr. Kay. The caption of the case
19 itself reflects 150 call signs, and that reflects something
20 well over 300 different repeater sites.

21 Mr. Kay repeatedly asked for a bill of particulars
22 or something to tell him which stations he is allegedly
23 failed to have constructed on time. Again, not until the
24 eve of hearing was he ever provided with even a list of call
25 signs, much less specific sites.

1 You know, this is a massive amount of material.
2 He did his best. Without consulting with him, I am not even
3 conceding this point. If there are a few documents that
4 slipped through the cracks, especially going back to 1988, I
5 do not see how that should affect their admissibility at
6 this point. Again, the Bureau is certainly free to argue
7 whatever they want, but that was the second point I was
8 going to make.

9 As far as any prejudice or additional time, I will
10 point out that these documents, the very document we are now
11 arguing about, was exchanged with the Bureau in June of
12 1998, so if there was some objection as to it, it could have
13 been raised long before now. Also, if there was any need to
14 do any follow up if there was any prejudice, they have had
15 over six months now to deal with that.

16 I still believe it should be admitted, and I have
17 no problem with the Bureau making whatever argument they
18 want about untimeliness.

19 JUDGE CHACHKIN: What is your response to that?
20 You have had this since June of 1998.

21 MR. KNOWLES-KELLETT: We are not asking for
22 additional time, Your Honor. We have not asked for it. You
23 offered it. I am telling you we do not need it.

24 JUDGE CHACHKIN: Well, the point of the matter
25 is --

1 MR. KNOWLES-KELLETT: Your Honor, the prejudice
2 was before that.

3 JUDGE CHACHKIN: We are not dealing with the
4 308(b) issue. You have a construction issue here.

5 MR. KNOWLES-KELLETT: Right. The prejudice --

6 JUDGE CHACHKIN: This is relevant to the
7 construction issue. You have had this since June of 1998.
8 I was not the Judge in June of 1998.

9 At no time did you move to strike any of this
10 material, as far as I know, and the Judge insisted that they
11 exchange their exhibits.

12 MR. KNOWLES-KELLETT: Yes.

13 JUDGE CHACHKIN: So you have had this since June,
14 1998.

15 MR. KNOWLES-KELLETT: Our objection is --

16 JUDGE CHACHKIN: You have just raised it for the
17 first time now.

18 MR. KNOWLES-KELLETT: You are right.

19 JUDGE CHACHKIN: Six months later.

20 MR. KNOWLES-KELLETT: This, Your Honor, is the
21 first time we have been asked for our objections to the
22 admission to this document.

23 JUDGE CHACHKIN: You had these exhibits. If you
24 were going to object on the grounds that this was contrary
25 to discovery, how come you did not raise it in June of

1 1998 --

2 MR. KNOWLES-KELLETT: Your Honor, I think --

3 JUDGE CHACHKIN: -- when you had the Judge before
4 you who took --

5 MR. KNOWLES-KELLETT: Immediately after the
6 exchange, Your Honor, there was a motion to disqualify the
7 Judge. I think it happened within two days afterwards.

8 When we came back on, in terms of pre-trial
9 motions, we were told that we were going to take this up
10 on --

11 MR. SCHAUBLE: An admission session on the 4th.

12 MR. KNOWLES-KELLETT: -- an admission session on
13 the 4th, and then Your Honor decided that they did not have
14 to present their evidence, so we did not know that these
15 would be their exhibits until today.

16 JUDGE CHACHKIN: All right, but I still do not
17 understand. We are not talking about the free weight
18 issues. You concede this is relevant to the construction
19 issues, is it not?

20 MR. KNOWLES-KELLETT: We concede that Forest
21 Service permits generally are very relevant, Your Honor.

22 JUDGE CHACHKIN: And also you concede that it
23 would be an incomplete record if we do not have this
24 material?

25 MR. KNOWLES-KELLETT: Right.

1 JUDGE CHACHKIN: And also I assume you will have
2 to concede that if you had this material six months ago or
3 whenever this discovery request was made --

4 MR. KNOWLES-KELLETT: This discovery request was
5 made in 1995.

6 JUDGE CHACHKIN: All right. In 1995, it would not
7 have made any difference in terms of your conducting any
8 further investigation at that point.

9 MR. KNOWLES-KELLETT: I am not conceding that,
10 Your Honor.

11 JUDGE CHACHKIN: I am not talking about the 308(b)
12 letter. I am talking as far as this issue is concerned.

13 MR. KNOWLES-KELLETT: I am not conceding that,
14 Your Honor.

15 JUDGE CHACHKIN: Well, you had all these other
16 permits. What did you do with them?

17 MR. KNOWLES-KELLETT: What we did with those
18 permits, Your Honor, is we went and we investigated all
19 those that were not permitted for when the original -- first
20 of all, we spent a long time, and it is actually in an
21 exhibit that was not offered.

22 As a proffer, I point your attention to 288. We
23 spent an extensive amount of time analyzing what was
24 permitted and what was not permitted.

25 JUDGE CHACHKIN: How did you go about it? Did you

1 check with the Forest Service as to each one of these
2 things?

3 MR. KNOWLES-KELLETT: That was not our burden,
4 Your Honor.

5 JUDGE CHACHKIN: What do you mean? Whose burden
6 is it? The burden of proof on this issue is on you.

7 MR. KNOWLES-KELLETT: You are right, Your Honor.

8 JUDGE CHACHKIN: You have to establish that. They
9 do not have to establish that there was construction. You
10 have to establish there was no construction.

11 MR. KNOWLES-KELLETT: You are right, Your Honor,
12 and we have the right to discovery on that matter. We have
13 the right to rely on the discovery on that matter.

14 JUDGE CHACHKIN: No. If they produce nothing, if
15 they had nothing in that file, what you should have done is
16 if you checked all these permits, you should have gone to
17 the Forest Service, the direct source of this, and checked
18 with them in your investigation.

19 MR. KNOWLES-KELLETT: I disagree, Your Honor.

20 JUDGE CHACHKIN: Do you mean your investigation
21 only consisted of reviewing their documents without --

22 MR. KNOWLES-KELLETT: With respect to Forest
23 Service permits, Your Honor, we requested all Forest Service
24 permits in his possession. That is, I view, sufficient.

25 You can tell us how to conduct our investigations,

1 Your Honor. However --

2 JUDGE CHACKIN: So what is your point? Your
3 point you would argue in your conclusion that if they did
4 not submit a document showing that there was construction
5 that you would take the view there was no construction?

6 MR. KNOWLES-KELLETT: Exactly, Your Honor. In
7 the --

8 JUDGE CHACKIN: Even though you have not
9 established by Forest Service material that in fact there
10 was no construction?

11 MR. KNOWLES-KELLETT: Your Honor?

12 JUDGE CHACKIN: If they had lost half of their
13 permits --

14 MR. KNOWLES-KELLETT: Your Honor?

15 JUDGE CHACKIN: Your position would be if they
16 had lost half of their permits, and I do not know how long
17 they are required to keep them, but in fact if for some
18 reason they had misplaced it or lost them, you would still
19 take the view you had met your burden because they had not
20 given you the Forest Service permits, even though the burden
21 is on you to go to the Forest Service and obtain all the
22 permits, or at least check?

23 MR. KNOWLES-KELLETT: I disagree with you, and I
24 would appreciate if I could be heard on this, Your Honor.

25 JUDGE CHACKIN: Yes.

1 MR. KNOWLES-KELLETT: Okay. If we were the IRS
2 conducting an investigation of somebody's taxes, the way you
3 view it --

4 JUDGE CHACHKIN: The IRS is different --

5 MR. KNOWLES-KELLETT: May I be heard?

6 JUDGE CHACHKIN: -- because everything is
7 confidential. Is the Forest Service confidential?

8 MR. KNOWLES-KELLETT: May I be heard?

9 JUDGE CHACHKIN: Would that material have been
10 made available to you if you had gone directly to the Forest
11 Service?

12 You are talking about the IRS. I know the IRS you
13 have to have permission from the taxpayer before you could
14 examine material. We are not dealing with the IRS here. We
15 are dealing with another Government agency --

16 MR. KNOWLES-KELLETT: I would like --

17 JUDGE CHACHKIN: -- who presumably would have
18 copies of all these permits if you had gone and looked at
19 them.

20 MR. KNOWLES-KELLETT: Your Honor, I cannot tell
21 you for certain whether they would or they would not.

22 JUDGE CHACHKIN: You did not check apparently.

23 MR. KNOWLES-KELLETT: I would appreciate if you
24 would let me state my argument on the record, and then --

25 JUDGE CHACHKIN: Go ahead.

1 MR. KNOWLES-KELLETT: -- you could shoot me down
2 if you please.

3 JUDGE CHACHKIN: Go ahead.

4 MR. KNOWLES-KELLETT: You are in charge.

5 My argument is that if we were the IRS and we were
6 examining losses by Mr. Kay and we asked for his records of
7 income and losses and then he came in and said that he had
8 losses, to say that we should have gone to the bank to see
9 if he had additional losses would be absurd. The
10 appropriate sanction in discovery is that it be excluded.

11 There is a long line of cases that say that you
12 have the ability to exclude things that are not produced in
13 evidence during discovery. I do not have those cites in
14 hand. I think many of them you will find in our motion for
15 summary decision.

16 JUDGE CHACHKIN: I think you will also find in all
17 those cases it is a matter of discretion with the Judge --

18 MR. KNOWLES-KELLETT: You are right.

19 JUDGE CHACHKIN: -- as to whether there is any
20 prejudice by receiving the material. So far, you have not
21 shown me that there was any prejudice because all you are
22 relying on is the documents that they produced. Now they
23 have given you other documents, which apparently for some
24 reason they did not produce earlier.

25 MR. KNOWLES-KELLETT: It is not just discretion

1 with respect to prejudice, Your Honor. There is an orderly
2 conduct to the proceeding, and Mr. Kay's conduct in this
3 proceeding has been incredibly abusive. He has not
4 cooperated at all in discovery, and it is an appropriate
5 time to be sanctioning him.

6 MR. SHAINIS: Your Honor, if I could --

7 JUDGE CHACHKIN: I have not found any lack of
8 cooperation by Mr. Kay since I have become the Judge in this
9 proceeding.

10 MR. SHAINIS: Your Honor, I would like to --

11 MR. KNOWLES-KELLETT: Have you reviewed the record
12 in this proceeding, Your Honor?

13 JUDGE CHACHKIN: I am not going to discuss what
14 happened earlier. I was not the Judge. Things might have
15 been different. I do not know. It is not my province. All
16 I know is I am concerned.

17 We have an issue here, and you are asking me
18 possibly to disqualify Kay under this issue, even though
19 there is available records dealing with that issue. Now, I
20 am surprised that the Bureau would take that position.

21 MR. KNOWLES-KELLETT: Your Honor, in light of the
22 abuse of discovery in this case, we strongly take that
23 position. You can rule against us.

24 JUDGE CHACHKIN: I certainly will, unless you can
25 show me you have been prejudiced some way by having had the

1 documents since June instead of having them since 1995. If
2 you cannot show --

3 MR. KNOWLES-KELLETT: I have explained the
4 prejudice. It has only been that we have been investigating
5 dead end roads, and it has been tying up Bureau resources as
6 a result of Kay's abuse of discovery.

7 JUDGE CHACHKIN: I am not --

8 MR. SHAINIS: Your Honor, I would like to respond.

9 JUDGE CHACHKIN: Let's not talk about this. We
10 will go back to 308. You are going back to 308 in your
11 argument?

12 MR. KNOWLES-KELLETT: No. Also, we requested
13 these documents legitimately. We moved to compel. He was
14 Ordered to compel, and he did produce them.

15 JUDGE CHACHKIN: Apparently he did furnish to you
16 a load of documents relating to Forest permits, did he not?

17 MR. SHAINIS: Yes, sir.

18 MR. KNOWLES-KELLETT: A load of documents in fact,
19 Your Honor.

20 JUDGE CHACHKIN: How many did he supply?

21 MR. KNOWLES-KELLETT: Three hundred and sixty-nine
22 pages, Your Honor.

23 JUDGE CHACHKIN: He gave you 369 pages?

24 MR. KNOWLES-KELLETT: Yes.

25 JUDGE CHACHKIN: And now? How much is he seeking